

April 13, 2006

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Room PL-401, Plaza Level
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VIA OVERNIGHT DELIVERY

**RE: Docket No. USCG-2004-16877 – Draft General Conformity Determination
for the Cabrillo Port Liquefied Natural Gas Deepwater Port Project
(March 2006)**

Lieutenant Kusano:

The following comments are submitted by the Environmental Defense Center on behalf of our client, the California Coastal Protection Network (“CCPN”), regarding the Draft General Conformity Determination for the Cabrillo Port Liquefied Natural Gas Deepwater Port project. CCPN is a California public benefit corporation, dedicated to the protection of the California coast through education, research, and empowerment of public citizens. CCPN is headquartered in Santa Barbara, California and its membership includes individuals in Santa Barbara, Ventura, and Los Angeles Counties.

The U.S. Coast Guard and the U.S. Maritime Administration (referred to here collectively as the “Coast Guard”) are responsible for determining whether BHP Billiton, Inc. may receive a permit under the Deepwater Port Act to construct and operate the Cabrillo Port Liquefied Natural Gas Deepwater Port Project (“Cabrillo Port Project”). 33 U.S.C. § 1501 et seq. The Coast Guard, therefore, has the affirmative responsibility under the Clean Air Act to ensure that the Cabrillo Port Project “conforms” to the applicable State Implementation Plan (“SIP”), a document that identifies the control measures and strategies that will be necessary for an area to achieve clean air. 42 U.S.C. § 7506(c)(1).

In March of 2006, the Coast Guard issued a Draft General Conformity Determination (“Draft Conformity Determination”) to attempt to fulfill its Clean Air Act responsibilities. As a general matter, EDC agrees with the Coast Guard’s conclusion that construction related emissions in Los Angeles County do not conform with the most

recent EPA approved SIP for that area. However, we disagree with the Coast Guard's conclusion that construction related emissions in Ventura County do not trigger general conformity review.

The Draft Conformity Determination is also seriously flawed because the Coast Guard fails to evaluate the full scope of emissions resulting from the Cabrillo Port Project. The Coast Guard excludes from consideration all emissions from offshore construction and operation – i.e., the majority of emissions associated with this project. Although these emissions are initially generated offshore, they will blow onshore and significantly increase the pollution burden in Ventura and Los Angeles Counties. The Coast Guard also fails to consider the increased NOx emissions that may be released from residential and industrial sources that will use the natural gas imported via the Cabrillo Port Project.

A full accounting and review of the Cabrillo Port Project emissions will demonstrate that the Project does not conform to the SIPs for Ventura and Los Angeles Counties. Both of these areas are designated “non-attainment” for ozone, an air pollutant that causes serious health problems, particularly for individuals who exercise outdoors and for children and adults with asthma and chronic pulmonary lung disease. Ozone also causes serious agricultural damage. The Cabrillo Port Project will undermine Ventura and Los Angeles Counties' efforts to achieve healthy air quality levels for ozone.

EDC's comments are presented in more detail below.¹ The Draft Conformity Determination must be revised to address the identified inadequacies, and the revised Draft conformity determination must also be re-circulated for an additional round of public comment.

I. Legal Framework

Section 176(c)(1) of the Clean Air Act (“CAA”) requires that:

No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, an activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title The assurance of conformity to such an implementation plan shall be an affirmative

¹ These comments are submitted in compliance with the April 14, 2006 deadline imposed in the Draft Conformity Determination. Draft Conformity Determination at 8. However, the Coast Guard has separately indicated that “any comments relating to air quality or the underlying Draft General Conformity Determination will be accepted until the end of the DEIR comment period.” Prescott 2006. We will thus identify additional comments relevant to the Coast Guard's general conformity determination when we submit comments on the California State Lands Commission's Revised Draft Environmental Impact Report.

responsibility of the head of such department, agency, or instrumentality.
Conformity to an implementation plan means –

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the [NAAQS] and achieving expeditious attainment of such standards; and

(B) that such activities will not –

- (i) cause or contribute to any new violation of any standard in any area;
- (ii) increase the frequency or severity of any existing violation of any standard in any area;
- (iii) or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

42 U.S.C. § 7506(c)(1).

These specific provisions were added to the CAA in 1990 for the explicit purpose of ensuring that:

Federal agencies do not take or support actions which are in any way inconsistent with the effort to achieve [the National Ambient Air Quality Standards] or which fail to take advantage of opportunities to help in the effort to achieve [the National Ambient Air Quality Standards].

H. Rep. 101-490, 101st Cong., 2d Sess. 222 (1990). See also, S. Rep. 101-228, 101st Cong., 2d Sess. 28 (1990) (“The purpose of the conformity language is to assure that before in any way participating in an activity, a Federal agency must find that the activity does not cause or contribute to violations of an ambient standard in any area, does not increase the severity or frequency of existing violations, and does not delay progress in achieving ambient standards in any nonattainment area By evaluating air quality impacts of proposed activities before they are undertaken, future pollution problems can be prevented.”)

In November of 1993, the U.S. Environmental Protection Agency (“EPA”) promulgated regulations establishing the criteria and procedures for determining conformity of Federal actions – or “general conformity.” 58 Fed. Reg. 63214 (Nov. 30, 1993).² These regulations were subsequently incorporated by reference into the Ventura

² A different set of regulations applies to “transportation conformity” decisions. See, e.g., 58 Fed. Reg. 62188 (Nov. 24, 1993). These regulations do not apply to the Coast Guard’s decision for the Cabrillo Port Project.

County Air Pollution Control District ("VCAPCD") rules and the South Coast Air Quality Management District ("SCAQMD") rules. VCAPCD Rule 220; SCAQMD Rule 1901. For the sake of simplicity, this comment letter will reference the Code of Federal Regulations sections (40 C.F.R. Part 51, Subpart W) rather than each District's rules. However, it is the Districts' rules that govern the Coast Guard's determination.³

II. Emissions From Onshore Construction Activities In Los Angeles County

The Draft Conformity Determination concludes that NOx emissions from onshore construction activities in Los Angeles County are subject to the General Conformity Rule and that these emissions "are deemed not to conform" with the 1997/1999 SIP. Draft Conformity Determination at 8. We agree with this conclusion. However, we have several significant concerns with the Coast Guard's determination.

First, the Coast Guard appears to improperly rely on SIP updates that have not been approved by EPA. The Coast Guard states that these emissions do not conform with SCAQMD's 2003 Air Quality Management Plan (AQMP). Draft Conformity Determination at 8. The Coast Guard also suggests that emission budget revisions to the 2003 AQMP or 2007 SIP could satisfy the conformity criteria. Draft Conformity Determination at 7. However, the conformity determination must be based only on the most recent *EPA approved* SIP. 40 C.F.R. § 51.852; 58 Fed. Reg. 63214, 63237-38. The most recent EPA approved SIP for SCAQMD is the 1997/1999 SIP. Draft Conformity Determination at 7. The 2003 AQMP and the 2007 SIP have not been approved by EPA. *Id.* Therefore, the Coast Guard cannot rely on the 2003 AQMP, any other SIP update, or any future modifications to such documents unless and until they are approved by EPA.

Second, it appears that the Coast Guard has omitted at least one of the general conformity criteria from its analysis.⁴ The Coast Guard states that construction emissions

³ The Draft Conformity Determination references 40 C.F.R. Part 93, Subpart W when describing general conformity criteria and procedures. Draft Conformity Determination at 6-7. Part 93 and Part 51 are identical in terms of the criteria and procedures governing general conformity determination. 58 Fed. Reg. 63214, 63215. The Part 93 provisions were promulgated by EPA so that the general conformity requirements would be immediately effective in the interim period before states revised their SIPs consistent with the Part 51 provisions. Once the SIPs were revised, however, federal agencies became subject to the general conformity requirements in the SIP. *Id.*

⁴ It is difficult to know with certainty which criteria the Coast Guard does include in its conformity analysis because the Agency does not provide any specific citations in its description of the criteria or in its findings. Draft Conformity Determination at 6-7. It appears that the second, third, and fourth bullet points on page 6 identify the provisions of 40 C.F.R. § 51.158(a). The first bullet may be identifying the requirement of 40 C.F.R. § 51.158(c), but if so, it is an incomplete description of that requirement, and, as discussed above, it is improperly identified as one of several options to demonstrate conformity. The revised Draft Conformity Determination must clearly identify the

in Los Angeles County must meet any one of the criteria identified in 40 C.F.R. § 93.158 (51.158). Draft Conformity Determination at 6. The general conformity criteria, however, clearly require that an action can only be deemed to conform if it meets any one of the provisions of 40 C.F.R. § 51.158(a) (which EPA refers to as the “air quality criteria”) *as well as* the requirements in 40 C.F.R. § 51.158(c) (which EPA refers to as the “emissions criteria”). 40 C.F.R. § 51.158(a) (an action will be deemed to conform if “the action meets the requirements of paragraph (c) of this section, *and* meets any of the following requirements”) (emphasis added); 58 Fed. Reg. 13836, 13844-46 (Mar. 15, 1993) (“The CAA establishes *both* air quality related criteria and emissions related criteria which must be met before an action can be determined to conform to the applicable SIP,” and discussing the different criteria) (emphasis added). It thus seems that the Coast Guard has failed to consider, at least, the requirements of 40 C.F.R. § 51.158(c).

Section 51.158(c) states that “Notwithstanding any other requirements of this section” an action does not conform to a SIP unless emissions from the action are:

in compliance or consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements.

40 C.F.R. § 51.158(c). In order to demonstrate conformity, the Coast Guard must establish that this action meets these requirements, as well as the requirements of 40 C.F.R. § 51.158(a). It is possible that the Coast Guard has omitted consideration of 40 C.F.R. § 51.158(c) because it otherwise determined the onshore construction emissions in Los Angeles County would not conform to the SIP. However, since the Coast Guard is apparently providing BHP Billiton with an additional opportunity to “file all appropriate documentation” to otherwise demonstrate conformity, it is critical that the Coast Guard properly consider all of the general conformity criteria for any future evaluations of the Cabrillo Port Project. Draft Conformity Determination at 7-8.

Third, it appears that the estimated emissions for construction are based on unsupported and unreasonably optimistic assumptions regarding the construction schedule and emission inventory. Sears 2006⁵ at 10-12. “Delays or underestimated activity days translate into additional construction emissions not accounted for in the Draft Conformity Determination.” *Id.* at 12. The Coast Guard should revise the estimated emissions to reflect a more realistic construction schedule. Although, the Coast Guard has already determined that, even under their unrealistic assumptions, construction emissions

criteria by reference to the applicable regulations so that the public can identify the basis for the Coast Guard’s evaluation and decision.

⁵ Camille Sears, an air quality expert with over 25 years of professional experience, has reviewed and prepared comments on the Coast Guard’s Draft Conformity Determination. Sears 2006. These comments are referenced throughout this letter, and Ms. Sears’ April 13, 2006 comment letter in its entirety is incorporated herein by reference.

in Los Angeles County will not conform to the applicable SIP, it is still necessary for the Coast Guard to identify a realistic estimate of emissions. This estimate will determine the appropriate amount of mitigation or offsets required for the project to conform to the applicable SIP, and under current assumptions, the Coast Guard is underestimating the amount of mitigation or offsets that will be required. Id.

Lastly, we are concerned that fundamental information relevant to the Coast Guard's general conformity determination has not been provided to the public for an opportunity to review and comment. As mentioned above, it appears that BHP Billiton is being afforded another opportunity to provide the Coast Guard with information that could support a finding of conformity. Draft Conformity Determination at 7-8. This information must be provided to the public for review and comment before the Coast Guard can rely upon it to make conformity decisions. 40 C.F.R. § 51.856; see, also, Ober v. U.S. EPA, 84 F.3d 304, 313-316 (9th Cir. 1996) (holding that post-comment period information that is critical to agency's decision must be made available for public review and comment before the agency makes its final decision). The Coast Guard cannot deprive the public of its right to evaluate information critically important to the General Conformity Determination.

III. Emissions From Onshore Construction Activities In Ventura County

The Coast Guard has concluded that construction emissions in Ventura County are not subject to the General Conformity Rule. Draft Conformity Determination at 5. However, as with the construction emissions in Los Angeles County, the construction emissions in Ventura County have been underestimated. Sears 2006 at 10-12. As a result, the Coast Guard's conclusion that Ventura County construction emissions will not exceed the de minimus thresholds triggering a general conformity determination is questionable.

The Coast Guard estimates Ventura County NOx emissions at 86.4 tons per year, only 14 tons per year under the de minimus threshold of 100 tons/year for Ventura County. Draft Conformity Determination at 5. Any variance from the optimistic assumptions underlying this emissions estimate – including a minor schedule delay, an underestimation of the number of equipment needed, an underestimation of the equipment size and horsepower necessary, or an underestimation of the equipment load – could easily result in NOx emissions greater than 100 tons/year. Sears 2006 at 11-12.

The Coast Guard must revise the Ventura County construction emissions estimates to reflect more realistic and reasonable schedule and equipment assumptions. We believe more realistic assumptions are likely to result in total estimated emissions that will equal or exceed the de minimus threshold for NOx emissions in Ventura County. Id. Such emissions must be analyzed for conformity to the applicable SIP. Id.

IV. Emissions From Offshore Construction And Operation Activities

The Coast Guard has concluded that “any emissions related to FSRU installation and operations (including support vessel operation) in attainment, maintenance, or

nonattainment areas would not be subject to General Conformity.” Draft Conformity Determination at 3. Similarly, the Coast Guard has concluded that “any emissions generated from Project-related operations and construction that occur in Federal waters are not subject to the General Conformity Rule.” *Id.* at 4. The Coast Guard’s decision to exclude consideration of these emissions, which comprise the bulk of project emissions, from the Draft Conformity Determination is legally and factually unsupportable.

a. Federal Law Requires That The Cabrillo Port Project Be Regulated As If It Were Located In A Nonattainment Area For Ozone

The Coast Guard’s conclusion rests on the erroneous premise that offshore construction and operation emissions are generated in areas designated as “attainment/unclassifiable.” *Id.* at 3-4. We dispute this premise.

i. *The Deepwater Port Act and the Clean Air Act Require Application of Onshore Air Quality rules to a Deepwater Port*

The Deepwater Port Act (“DPA”) regulates the licensing and operation of deepwater ports and expressly requires consistency with all local, state and federal laws. For purposes of ensuring that the air emissions from a deepwater port are regulated under local, state and federal laws, a deepwater port “shall be considered as a new source under the CAA, as amended (42 U.S.C. 7401 et seq.) . . .” DPA § 1502 (9). In fact, conformity with all provisions of the Clean Air Act (“CAA”) is a condition of issuance of the Deepwater Port license. DPA § 1503(C)(6).

Contemplating that the regulation of a Deepwater port located in federal waters may exempt it from several environmental laws, the DPA expressly provides that “the law of the nearest adjacent coastal State . . . is declared to be the law of the United States and shall apply to any deepwater port licensed pursuant to this chapter . . .” DPA § 1518 (a). “Nearest adjacent coastal state” is defined as the State located within 15 miles of the port and whose boundaries if extended seaward beyond three miles would encompass the port. DPA § 1502 (B); 1518(b). These provisions are relevant to determine which local air district rules apply to Cabrillo Port for purposes of the CAA, which delegates authority to the States to control air quality. As the permitting agency for Cabrillo Port, EPA has determined that VCAPCD Local Rules shall apply. Zimpfer 2005.

Thus, even though Cabrillo Port is physically located in an area outside local and state jurisdiction, the DPA insists the federal agencies apply VCAPCD’s local rules for purposes of regulating and evaluating air quality impacts. As discussed below, the Coast Guard must ensure these rules be applied in manner that protects the state’s air quality, and does not contribute to the federal and state non-attainment status of ozone for Ventura County and LA County. By excluding the offshore portion of the Cabrillo Port Project from the General Conformity Rule the Coast Guard has failed to follow its statutory mandate.

ii. *The Draft Conformity Determination Incorrectly Concludes that Federal Waters are "Attainment/Unclassifiable"*

The Draft Conformity Determination incorrectly concludes "Federal waters are considered attainment/unclassifiable and are not maintenance areas under 40 CFR 81." Draft Conformity Determination, p. 4. Based on this conclusion, the Coast Guard excludes any emissions generated by Cabrillo Port from operations or construction that occur in federal waters. This exclusion from the General Conformity Rules is legally indefensible for the following five reasons.

First, federal waters have not been designated as attainment, non-attainment or unclassifiable. 40 CFR part 81.305. In fact, EPA informed the Coast Guard that federal waters have not been designated. Zimpfer 2005. The Coast Guard's statement that "Federal waters are considered attainment/unclassifiable . . ." is wrong. The Coast Guard's decision to exclude the offshore emissions from Cabrillo Port relies on this false legal premise and is therefore unlawful.

Second, the DPA expressly mandates that a deepwater port, though located in federal waters, such as Cabrillo Port, should not be exempt from the *nearest* onshore environmental regulations. Cabrillo Port is located just 14 miles from the nearest onshore point in Ventura County, whereas it is located more than 18 and 24 miles from Anacapa and San Nicolas Islands, respectively. Thus, the geographically closest air quality designations must apply to Cabrillo Port – which in this case is the federally designated non-attainment onshore area in Ventura County.

Third, Congress directed the application of local and state law specifically to those ports located within 15 miles of the nearest onshore boundary when it defined "nearest adjacent coastal state" in the DPA. DPA §§ 1502 (B); 1518(b). A deepwater port, such as Cabrillo Port, located between 3 and 15 miles is located in Federal waters. As such, a deepwater port located in federal waters within 15 miles of a coastal state must be regulated in a manner consistent with the onshore air quality designations assigned by the state, even if those laws are more stringent than federal laws. Section 19 (b) of Senate Report 93-1217 (Oct. 2, 1974). In this case the corresponding onshore area is non-attainment for ozone pre-cursors under both federal and state designations, thus the General Conformity Rule does apply to all of the offshore emissions from the Cabrillo Port project in federal waters.

Fourth, according to EPA, attainment designations have intentionally not been assigned to Federal waters because existing outer continental shelf ("OCS") sources are covered by OCS Air Regulations. Rios 2004c. OCS sources located within 25 miles of California's seaward boundary are regulated in accordance with the corresponding onshore area's designation for each pollutant because offshore sources can contribute to onshore non-attainment problems. CAA § 328 (a)(1); and 40 C.F.R. Part 55; see, also, Sears 2006 at 4-10. When Congress enacted the DPA it intended to regulate offshore sources in a similar manner as OCS sources under the OCSLA. See Section 19(b) of Senate Report 93-1217 (Oct. 2, 1974) regarding the meaning of DPA § 1518(b), "The

effect of this subsection is to establish a system of deepwater port regulation similar to that governing the operation of structures erected on the Outer Continental Shelf in accordance with the Outer Continental Shelf Lands Act.” For this reason, § 1518 (b) of the DPA uses the exact same language from OCSLA in directing the application of state and local law to deepwater ports located in federal waters. 43 USC § 1333(a)(2)(A). In this case, state and federal law both designate the applicable onshore area as non-attainment for ozone.

Fifth, as EPA has previously stated, Section 1518(a) of the DPA:

extends the Constitution and laws of the United States ‘to deepwater ports . . . and to activities connected, associated, or potentially interfering with the use or operation of any such port, in the same manner as if such port were an area of exclusive Federal jurisdiction located within a State.’ Section 118 of the Clean Air Act speaks directly to the question of how an area of exclusive Federal jurisdiction located within a State is to be treated for purposes of the Clean Air Act: the state implementation plan is to apply.”

Rios 2004c at 5.

Thus, for the Coast Guard to ignore the portion of Cabrillo Port in federal waters from the General Conformity rule undermines the CAA, the DPA and Congress’s express intentions to account for emissions from federal projects located in federal waters that may affect onshore air quality. The Coast Guard cannot assure that its actions in licensing Cabrillo Port will not cause SIP violations if it fails to analyze the part of the project located in federal waters – which encompasses the bulk of the NO_x and ROC emissions that will blow onshore to the ozone non-attainment areas.

iii. Ventura County Nonattainment Rules for Ozone Precursors Apply to Cabrillo Port

1. Federal law designates the nearest onshore area of Ventura County as nonattainment for ozone.

Cabrillo Port will be located approximately 14 miles offshore of Ventura County in federal waters. Ventura County is located in the South Central Coast Air Basin. 17 CCR § 60103. The boundaries of Ventura County include two offshore Channel Islands: Anacapa Island and San Nicolas Island. Cal. Gov. Code § 23156. All of Ventura County, *including the Islands*, is designated as non-attainment for ozone for not meeting California’s air quality standards. 17 C.C.R. §§ 60201 and 60205. Although Ventura County is still designated non-attainment for ozone under federal standards promulgated by EPA, Anacapa and San Nicolas Islands are inexplicably designated as “unclassifiable/attainment” for each pollutant.⁶ 40 C.F.R. § 80.305.

⁶ An area is only designated as “unclassifiable” when the data do not support a designation of attainment or non-attainment. As identified and analyzed in Camille

As discussed above, federal law dictates that the Cabrillo Port Project be regulated as if it were physically located in the onshore, federally-designated, nonattainment area. Even if this was not the case, for purposes of regulating a deepwater port, such as the Cabrillo Port, Congress explicitly intended the state's designation of Ventura County's non-attainment status for ozone, which includes the Channel Islands, to control. Section 1518 (b) of the DPA "prevents the Deepwater Port Act from relieving, exempting or immunizing any person from requirements imposed by State or local law or regulation. In addition, States are not precluded from imposing more stringent environmental or safety regulations." Section 19 (b) of Senate Report 93-1217 (Oct. 2, 1974).

2. Cabrillo Port is not exempt from regulation as a New Source in a nonattainment area under VCAPCD Local Rules and regardless these rules do not change the state ozone nonattainment designation for Ventura County, including Anacapa and San Nicolas Islands.

VCAPCD Local New Source Review ("NSR") Rule 26 applies to the Cabrillo Port Project because state and federal law require the port to be regulated as if it were located in the onshore non-attainment area of Ventura County. This was EPA's position for almost two years when it was reviewing Cabrillo Port's significant air quality impacts and permit application. McLeod 2004; Rios 2004a; Rios 2004b; Rios 2004c. EPA wrote several thoroughly researched legal briefs defending this position to the applicant and the White House. *Id.* In fact, in a letter addressed to the White House, EPA concluded that its determination to apply the onshore non-attainment rules to Cabrillo Port "represents EPA nationwide policy on implementation of the Deepwater Port Act (DPA) and the Clean Air Act (CAA) with respect to offshore facilities." McLeod 2004.

Inexplicably, and after considerable lobbying from the applicant, EPA changed its position without any cognitive legal explanation in June 2005. Zimpfer 2005; Kirby 2004; Meheen 2004; Umenhofer 2004. EPA's change in position makes no sense in light of the fact that the emissions from the Cabrillo Port Project will be transported onshore. Sears 2006 at 4-10. Despite rejecting BHP Billiton's plethora of legal briefs on this issue, EPA cited to a VCAPCD exemption from New Source Review for "any emissions unit located on San Nicolas Island or Anacapa Island." VCAPCD Rule 26.3 – New Source Review – Exemptions; Rios 2004c. This exemption is simply inapplicable to Cabrillo Port because it is not located on either of these islands as required by the plain language of the exemption.

EPA originally rejected the applicability of this exemption on several relevant grounds: 1) the inappropriateness of permitting Cabrillo Port as if it were located within a

Sears' Report, the data collected on Anacapa Island before the air monitor was removed in 1992 reported several national and state air quality violations. Sears 2006 at 12-14.

National Park which encompasses Anacapa Island, or as if it were part of the Naval Base which encompasses San Nicolas island; 2) the types of sources located on these islands and the unlikelihood of any new major sources being located on the islands; 3) the reasons why VCAPCD exempted sources on the island did not encompass Cabrillo Port; 4) the location of the islands in comparison to the port since Cabrillo Port is several miles closer to the onshore area than it is to either island; and 5) the reasons behind Congress requiring offsets for OCS sources within 25 miles of an onshore non-attainment area. None of these have changed today to provide a basis for the Coast Guard to stray from EPA's original determination that the Cabrillo Port Project should be regulated as if it were in a nonattainment area. McLeod 2004.

Despite EPA's June 29, 2005 arbitrary change in position and political determination regarding the air permit, the Coast Guard is not relieved of its obligation to regulate Cabrillo Port in a manner consistent with both the CAA and the DPA. These statutes require that Cabrillo Port's emissions from operations and construction in federal waters be regarded as occurring in a non-attainment area for ozone precursors, as designated by both federal and state law. 40 C.F.R. § 81.305; 17 C.C.R. §§ 60201 and 60205.

Moreover, even if VCAPCD's Rule 26.3 exemption were to apply to the Cabrillo Port project it does not relieve the Coast Guard of its responsibility to apply the General Conformity Rule to the offshore components of the project in federal waters. VCAPCD Rule 26.3 allows sources located on the islands to be exempt from offsets; however, it does not change the state's designation that those sources are still located in a non-attainment area for ozone pre-cursors. VCAPCD Local Rule does not re-designate or dispute that the islands are still located in a non-attainment area for ozone pre-cursors per the state law. It only addresses how those sources should be permitted, an issue that is not before the Coast Guard at this time.

Thus, for purposes of the Coast Guard's statutory responsibilities under the DPA and the CAA, excluding the offshore components of the Cabrillo Port Project from evaluation in the Draft Conformity Analysis is flawed since Cabrillo Port is required to be treated as if it were in a non-attainment area per federal and state law and VCAPCD's local rules do not change that designation.

b. Federal Law Requires Cabrillo Port Project Activities To Conform To Onshore Nonattainment Area SIPs

Even assuming that the FSRU and its associated vessels are properly characterized as part of an attainment/unclassifiable area, the CAA still requires the Coast Guard to evaluate whether the Cabrillo Port Project activities will conform to SIP provisions for *any* nonattainment area that may be impacted by project activities, not just the area in which the emissions are initially generated.

The plain language of CAA Section 176(c) imposes the broad mandate that "No department, agency, or instrumentality of the Federal Government shall engage in,

support in any way or provide financial assistance for, license or permit, or approve, an activity *which does not conform to an implementation plan* after it has been approved or promulgated under section 7410 of this title” (emphasis added). 42 U.S.C. § 7506(c)(1). Conformity is defined as:

- (A) conformity to *an implementation plan’s* purpose of eliminating or reducing the severity and number of violations of the [NAAQS] and achieving expeditious attainment of such standards; and
- (B) that such activities will not –
 - i. cause or contribute to any new violation of any standard in *any area*;
 - ii. increase the frequency or severity of any existing violation of any standard in *any area*;
 - iii. or delay timely attainment of any standard or any required interim emission reductions or other milestones in *any area*.

42 U.S.C. § 7506(c)(1)(A)-(B) (emphasis added). Thus, the legal standard of CAA Section 176(c) conformity is not based on the location of the activities, but on whether the activities will conform to “an” implementation plan’s requirements for “any” area. If project activities may impact SIP provisions for areas other than where the project is located, those activities must be evaluated for conformity with the SIP.

Section 176(c)(5) does clarify that “any” area means a nonattainment or maintenance area, and thus does not include areas initially designated “attainment.” 42 U.S.C. § 7506(c)(5). Nonetheless, the plain reading of Section 176(c) is that activities must conform to “an” implementation plan’s requirements for “any” nonattainment or maintenance area, not simply to the SIP requirements for the area in which the activities are located. Thus, nothing in Section 176(c)(5) or anywhere else in Section 176 limits the scope of the conformity determination to the area in which the activities are located.

Although it is not necessary to resort to legislative history under these circumstances, the legislative history for Section 176(c) only affirms this plain reading.⁷ CAA Section 176(c) was amended in 1990 for the explicit purpose of ensuring that:

Federal agencies do not take or support actions which are in any way inconsistent with the effort to achieve [the National Ambient Air Quality Standards] or which

⁷ Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

fail to take advantage of opportunities to help in the effort to achieve [the National Ambient Air Quality Standards].

H. Rep. 101-490, 101st Cong., 2d Sess. 222 (1990). In discussing these amendments, the Senate Report notes that:

The purpose of the conformity language is to assure that before in any way participating in an activity, a Federal agency must find that the activity does not cause or contribute to violations of an ambient standard in any area, does not increase the severity or frequency of existing violations, and does not delay progress in achieving ambient standards in any nonattainment area

S. Rep. 101-228, 101st Cong., 1st Sess. 28 (1990). These statements highlight Congress' intent that federal agencies would consider the full scope of project impacts on air quality goals. Ignoring known impacts from a project simply because the project is located in a separate area is utterly at odds with Congress' broad intention to ensure that federal actions do not interfere with the ability of "any nonattainment area" to achieve the National Ambient Air Quality Standards. *Id.*

c. Offshore Emissions Will Be Transported To Ventura County And Los Angeles County Nonattainment Areas

The absurdity of the Coast Guard's narrow legal interpretation of CAA Section 176 is precisely highlighted by the circumstances of the Cabrillo Port Project. Although the bulk of project activities will take place offshore, the emissions generated by these activities will be received onshore and will significantly increase the pollution burden in the South Central and South Coast Air basins. As acknowledged in the California State Lands Commission's Revised Draft Environmental Impact Report ("Revised DEIR"), emissions of NOx and ROC generated from construction and operation of FSRU equipment and project vessels may contribute to ambient ozone impacts in onshore areas downwind of the project location. CSLC 2006 at 4.6-33 – 4.6-35. The Revised DEIR similarly concludes that the dispersion of air pollutants (other than ozone precursors) from the FSRU and project vessels "would cause an increase in the ambient air concentrations of each pollutant at downwind locations in the Pacific Ocean and along the coast of California." CSLC 2006 at 4.6-38. The Revised DEIR identifies a range of projected impacts from project emissions, but notably, ozone precursor emissions from project related vessels are identified as a "Class I" impact for onshore areas – i.e., a significant impact that cannot be mitigated.⁸ *Id.* Both Ventura County and Los Angeles County are designated "nonattainment" for ozone.⁹ CSLC 2006 at 4.6-6.

⁸ The Revised DEIR separates FSRU emissions (Class II impact) from vessel emissions (Class I impact).

⁹ Ventura County is "moderate" nonattainment. Los Angeles County is "severe" nonattainment. Revised DEIR at 4.6-6.

Ms. Camille Sears, an air modeling expert with over 25 years of experience in her profession, has reviewed the Cabrillo Port Project and concluded that the Draft Conformity Determination improperly ignores the impacts from offshore project emissions on the onshore nonattainment areas. Sears 2006 at 4-10. Ms. Sears identifies and describes multiple published, peer reviewed studies and meteorological analyses, all of which demonstrate that “offshore emissions in the Project area are part of the onshore ozone nonattainment problem.” *Id.* at 5-10. Ms. Sears’ own analysis, based on existing wind flow data, corroborates these studies, and demonstrates that Cabrillo Port Project emissions will blow onshore into areas in Santa Barbara County, Ventura County, and Los Angeles County “roughly 80 percent of the time.” Sears 2006 at 8.

Ms. Sears’ findings are consistent with the SCAQMD’s request that the general conformity analysis include “ship activities and their associated emissions” to evaluate the potential impacts of such emissions on the South Coast Air Basin. Whynot 2005. The California Air Resources Board (“CARB”) has also concluded that offshore activities related to the Cabrillo Port Project, particularly the operation of marine vessels, will impact onshore nonattainment areas. Scheible 2006 (“... unmitigated marine vessel emissions that are emitted within California Coastal Waters would add to the air pollution burden in California and should be mitigated.”).

More generally, as Ms. Sears notes, CARB has concluded, based on extensive data (including island, shipboard, and coastal meteorological observations), that emissions within a certain distance off the California Coast (ranging coast-wide from 24 NM to 90 NM, or 27 to 102 miles) “are likely to be transported ashore and affect the air quality in California’s coastal air basins, particularly during the summer.” Sears 2006 at 9; see also, Scheible 2006 at Appendix B/Attachment, fn 1. CARB refers to this area as “California Coastal Waters.” *Id.* Recently, CARB has proposed a rule requiring marine vessels operating within a subset of California Coastal Waters (within 24 nautical miles of the California Coastline) to reduce the onshore impacts of marine vessel diesel emissions. CARB 2005. In support of this proposal, CARB states that:

The transport of air pollution over long distances and between air basins has been well established. The emissions from ocean-going vessels can travel great distances and numerous studies have shown local, regional, and global impacts on air quality Several studies support ARB staffs [sic] conclusion that emissions from ocean-going vessels released offshore the California Coast can impact onshore air quality.

Id. at IV-7.

Moreover, Congress itself recognized the significant impact offshore sources can have on coastal air quality when, at the same time it amended the Clean Air Act to tighten the general conformity requirements, it also directed EPA to control sources of pollution occurring offshore on the outer-continental shelf (“OCS”). See 42 U.S.C. § 7627. These requirements apply to OCS sources “within 25 miles of the seaward boundary” of the Pacific coast. 42 U.S.C. § 7627(a)(1). In enacting these requirements, Congress was

motivated by “the fact that OCS air pollution is causing or contributing to the violation of Federal and State ambient air quality standards in coastal regions.” S. Rep. 101-228, 101st Cong., 1st Sess. 28 (1990). Specifically, Congress noted that:

The magnitude of OCS pollution and the fact that the prevailing winds bring much of this pollution onshore has led the Environmental Protection Agency to express concern about the onshore air quality impacts from OCS development, along the coasts of both California and the Gulf States.

Id.¹⁰

This information demonstrates that there is no valid basis to dispute that Cabrillo Port Project ozone precursor emissions generated offshore will be transported to nearby ozone nonattainment areas, particularly in Ventura County and Los Angeles County.¹¹ Therefore, they must be evaluated for conformity with Ventura County and Los Angeles County SIPs.

The potential impacts of additional ozone precursor emissions on the nonattainment status of Ventura County and Los Angeles County cannot be downplayed. Although both areas’ ozone levels have improved since the early 1990s, they still have much to accomplish to achieve their air quality goals. See, e.g., SCAQMD 2003 at ES-4 (the South Coast Air Basin “still exceeds the federal 1-hour standard more frequently than any other location in the U.S.”). The failure of these areas to achieve ozone air quality standards means continuing severe health effects for the general population, and particularly for “children and adults with preexisting lung disease such as asthma and chronic pulmonary lung disease.” Id. Those who exercise outdoors are also highly susceptible to the adverse effects of ozone. Id. Nonattainment for ozone also means continued serious impacts to agriculture:

Ozone probably causes more injury to vegetation than any other air pollutant. According to the California Department of Food and Agriculture, ozone causes 80-90 percent of the air pollution related agricultural losses in California.

VCAPCD 1994 at 1-6 – 1-7.

As discussed above, the ozone precursor emissions from the Cabrillo Port Project will reach onshore areas. These emissions will “contribute to the onshore ozone

¹⁰ EPA has also more recently acknowledged that offshore emissions can have significant impacts for onshore ambient air quality. Rios 2004c, fn 12.

¹¹ BHP Billiton concludes that “there is insignificant potential for the proposed Project to impact the onshore ozone nonattainment area.” Sears 2006 at 9. However, this conclusion is based on a model that does not consider “photochemical reactions and other parameters necessary to assess ozone impacts.” Id. Their conclusion is thus unsupportable and otherwise flatly contradicted by the multiple studies and meteorological assessments demonstrating that offshore NOx emissions do blow onshore. Id.

nonattainment problem.” Sears 2006 at 7. These emissions are not included in the applicable SIPs. Sears 2006 at 3. Therefore, the offshore activities of the Cabrillo Port Project cannot be deemed to conform to the nonattainment SIP provisions for either Ventura County or Los Angeles County without the applicant obtaining offsets or some other form of mitigation. However, since the Coast Guard has completely failed to provide any information or analysis regarding offshore Cabrillo Port Project emissions, it is difficult for the public to provide any meaningful input on the matter. For this reason, the Draft Conformity Determination must be revised to include consideration of the FSRU and vessel emissions and then re-circulated for an additional round of public comment. 40 C.F.R. § 51.856; Ober v. U.S. EPA, 84 F.3d 304, 313-316 (9th Cir. 1996).

V. Increased Emissions From Sources Using Cabrillo Port Natural Gas

The importation of “hot gas” through the Cabrillo Port Project may cause additional and unaccounted SIP violations that the Coast Guard must consider in the Draft Conformity Determination.

The Cabrillo Port Project has not committed to importing gas from any specific source. CSLC 2006 at 4.6-24. This is important since the gas quality dictates its potential to emit NO_x. According to testing conducted by the South Coast Air Quality Management District, “the combustion of natural gas with uncharacteristically higher heating values could increase stationary source NO_x emissions by greater than 20%. . .” CSLC 2006 at 4.6-24. This uncertainty in the quality of the gas expected to be imported may cause the Cabrillo Port Project emissions to cause or contribute to a SIP violation in two ways.

First, BHP Billiton’s NO_x emission estimates are all based on an unfounded assumption that it will only import gas that has a heating value lower than 1,360 on the Wobbe index, such as that that could be supplied by the Scarborough field in Australia. Revised DEIR, 4.6-24. Gas that is lower than 1,360 on the Wobbe index results in lower NO_x emissions. BHP Billiton intends to run its vessels and crew and supply boats on the natural gas that it imports. If Cabrillo Port imports “hot gas” (higher than 1,360) from another region such as Indonesia, then its vessels, crew and supply boats would possibly be burning natural gas that has 20% or higher NO_x emissions than predicted in the Revised DEIR. Sears 2006 at 10. Since the Revised DEIR admits that NO_x emissions from Cabrillo Port could contribute to ozone impacts in areas located downwind of the project, an increase in NO_x emissions caused from using hot gas as part of project operations could cause or contribute to a SIP violation. Id.

Second, the end use of imported hot gas from Cabrillo Port in both residential and non-residential natural gas fired equipment could release increased NO_x emissions that may cause air quality violations and are not accounted for in the SIP budget. Id. These impacts could occur in the ozone non-attainment area in Ventura County, or any other ozone non-attainment areas that would import gas from Cabrillo Port. Id. This is a concern that SCAQMD shares regarding the importation of LNG from Cabrillo Port. SCAQMD 2005; Liu 2006.

These potential increases in NOx emissions have not been analyzed in the Draft Conformity Determination. Sears 2006 at 10. However, the General Conformity Rules requires the Coast Guard to consider the full impacts of the Cabrillo Port project on the SIP. In order for the Coast Guard to do this it must calculate and disclose a range of NOx emissions that could occur if Cabrillo Port imports hot gas from areas outside the Scarborough field in Australia. Currently, EPA has not obtained a commitment from the applicant in the air permit that it would limit the heat content of the gas imported to that used as a basis for its NOx emission calculations in the Revised DEIR and the air permit application. Thus, the Coast Guard has no basis to exclude from its Draft Conformity Determination an analysis of the potential impacts that imported hot gas from Cabrillo Port will have on the SIP.

VI. Conclusion

In sum, although EDC agrees with the Coast Guard's conclusion that construction related emissions in Los Angeles County do not conform to the most recent EPA approved SIP for that area, we find the Draft Conformity Determination to be wholly inadequate in carrying out CAA Section 176(c)'s mandate to ensure the Cabrillo Port Project will not interfere with Ventura County and Los Angeles County efforts to achieve federal air quality standards.

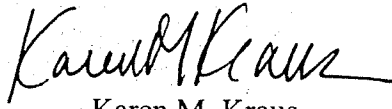
We disagree with the Coast Guard's emissions estimates for construction related emissions in Los Angeles County and Ventura County. For emissions in Los Angeles County, the Coast Guard has underestimated the amount of mitigations or offsets that are necessary to demonstrate conformity. For Ventura County, the Coast Guard has erroneously concluded that construction emissions will not trigger general conformity review.

The Coast Guard has also simply ignored the full scope of emissions resulting from the Cabrillo Port Project. The Draft Conformity Determination is seriously flawed because it does not identify and evaluate emissions from offshore construction and operation. These emissions comprise the bulk of emissions associated with this project, and although they are initially generated offshore, they will blow onshore and significantly increase the pollution burden in Ventura County and Los Angeles County. The Coast Guard also fails to consider increased NOx emissions that may result from residential and industrial sources that utilize natural gas imported via the Cabrillo Port. These emissions will interfere with Ventura County and Los Angeles County efforts to attain federal air quality standards for ozone.

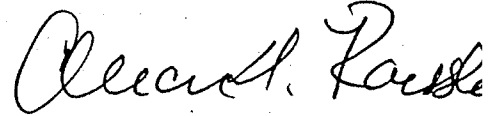
A full accounting and review of the Cabrillo Port Project emissions will demonstrate that the project's construction and operation does not conform to the SIPs for Ventura County and Los Angeles County, both of which are designated "non-attainment" for ozone. The Draft Conformity Determination must be revised to address the identified inadequacies, which are critical to the Coast Guard's final General Conformity decision, and ultimately to the ability of Ventura and Los Angeles County to

overcome their ozone problems. The revised Draft conformity determination must also be re-circulated for an additional round of public comment.

Sincerely,



Karen M. Kraus
Staff Attorney



Alicia I. Roessler
Staff Attorney

Attachments

LIST OF ATTACHMENTS

- California Air Resources Board (CARB). 2005. Initial Statement of Reasons for Proposed Regulations to Reduce Emissions from Auxiliary Diesel Engines and Diesel-Electric Engines Operated on Ocean-Going Vessels within California Waters and 24 Nautical Miles of the California Baseline. December 8.
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- Liu, Chung S. (Deputy Executive Officer, Science & Technology Advancement, SCAQMD). 2006. Letter to Michael H. Scheible (Deputy Executive Officer, California Air Resources Board). February 9.
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- Rios, Gerardo C. (Chief, Permits Office, Air Division, Environmental Protection Agency). 2004c. Letter to Steve Meheen (Project Manager, BHP Billiton LNG International Inc.). June 29.
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Ventura County Air Pollution Control District (VCAPCD). 1994. Ventura County 1994 Air Quality Management Plan, Ch. 1.

Whynot, J. (Planning and Rules Manager, South Coast Air Quality Management District). 2005. Letter to Paul J. Van Kerkhove, P.E. (Ecology and Environment, Inc.). March 9.

Zimpfer, Amy K. (Associate Director, Air Division, Environmental Protection Agency). 2005. Letter to Commander Mark Prescott (Chief, U.S. Coast Guard). June 29.